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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANIEL ARTHUR MATA, Defendant and Appellant.	E048229 (Super.Ct.No. FVI700196) OPINION

APPEAL from the Superior Court of San Bernardino County. Margaret A. Powers, Judge. Affirmed as modified.

Phillip I. Bronson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Jeffrey J. Koch, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Daniel Arthur Mata pled guilty to inflicting corporal injury on the mother of his children. (Pen. Code, § 273.5.)[1] He was first granted probation but later admitted violating probation. Defendant was sentenced to the middle term of three years. He challenges the denial of conduct credits under section 4019. We modify the judgment to impose an omitted court security fee, and grant defendant section 4019 credits.

I. BACKGROUND

The probation report, prepared for the sentencing hearing after defendant admitted violating probation, states section "4019 conduct credits eliminated by jail staff on 12-9-08," and "[defendant] failed his Work Release program and the jail withdrew his conduct credits." The record of defendant's booking shows defendant in custody from February 26, 2007, through April 5, 2007, and then again in custody from his probation sentencing on February 13, 2008, through August 5, 2008. He was "released for weekends" on August 5, 2008, and then from August 8, 2008, through December 9, 2008, he earned 10 actual days for weekends. He was in custody again starting on March 23, 2009, through to pronouncement of judgment on April 23, 2009.

The sentencing hearing had been set for April 22, 2009, but did not occur until April 23, 2009.

At the sentencing hearing, counsel for defendant stated, "the credits on the memo from probation, the actual time should be increased by one day because it was set for

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[1] Unless otherwise indicated, further statutory references are to the Penal Code.

yesterday. So it should be 256 days. They note zero credit under 4019 because there was some problems getting his jail time done. I would request that the Court consider giving him the 4019 credits which would be 128 days."

The People responded, "The People would object to any 4019 credits given to the defendant at this time after violations and the length of time he didn't get it done. Submit on the probation officer's report dated yesterday."

The trial court inquired as to whether section 4019 credits would accrue until defendant was transferred to state prison. Counsel for defendant responded that they would. The People did not respond.

Counsel for defendant again raised the issue of the credits, stating, "because the denial of the 4019 credits was something that was administratively done with the jail and not done by the Court, I would request that the Court not follow the administrative procedure done by the jail and give him his 4019 credits."

The trial court responded, "Why would I do that?"

Counsel for defendant replied, "Because I don't think there was any—I think there was a failure to do weekends or report to the jail, which in normal cases we would give 4019 credits. The jail in this case somehow felt it was appropriate to deny the 4019 credits. [¶] They are not denying 4019 credits because of problems he's created in the jail which is where we see most of the denial of 4019 credits where they are out of bounds. They are causing problems. [¶] So in this particular case we would normally give the 4019 credits even though if the person was having problems completing their

jail time. So I think it would be appropriate to be consistent and give him his 4019 credits."

The trial court responded: "Well, I certainly don't want to overrule something that the jail did because they have their own procedures, and I don't know anything about it. I'm not going to just [arbitrarily] overrule it."

The trial court then granted credit for 256 actual days of custody, withheld conduct credits, but ordered that conduct credits begin accruing as of the original hearing date, April 22, 2009.

The trial court did not impose a court security fee.

II. SECTION 4019 CREDITS

Defendant contends he is entitled to 64 days of good-time credit because there was no proof he engaged in bad behavior while in jail. Defendant also contends that he did not have adequate notice that the People sought forfeiture of his credits, and thus his due process rights were violated. Defendant requests reinstatement of 64 days of good-time credit. The People contend that the probation report provided adequate notice that conduct credits were at issue, but the matter should be remanded for a hearing regarding the jail's administrative decision despite the failure of defendant's trial counsel to request a hearing. We agree that the probation report provides adequate notice, but reinstate both good-time and work-time credit, because the record fails to show that defendant is not entitled to such credits.

A. *Notice*

"[B]efore a sentencing court may withhold conduct credits, the defendant is entitled to prior notice and an opportunity to (1) rebut the findings of his jail violations, and (2) present any mitigating factors. [Citation.]" (*People v. Duesler* (1988) 203 Cal.App.3d 273, 277 (*Duesler*).)

The probation officer's report indicated that the jail withheld conduct credits and did not include a calculation of any conduct credits. This adequately apprised defendant that withholding of conduct credits would be sought at the sentencing hearing. Indeed, defendant's trial counsel ably argued the issue at the sentencing hearing.

B. *Credits*

"Conduct credits for presentence custody are credited to the defendant's term of imprisonment 'in the discretion of the court imposing the sentence.' [Citation.] It is the duty of the sentencing court to determine 'the total number of days to be credited . . .' for presentence custody. [Citations.] [¶] Although the sheriff is authorized to deduct conduct credits for inmates jailed under a misdemeanor sentence or as a condition of probation, his role with respect to presentence custody credit is to provide the sentencing court with information, records and recommendations. [Citations.] The sheriff or the People have the burden to show that a defendant is not entitled to Penal Code section 4019 credits. [Citation.]" (*Duesler*, *supra*, 203 Cal.App.3d at p. 276.) "If the record fails to show that defendant is not entitled to such credits by virtue of the provisions of subdivisions (b) and (d) [of section 4019], he shall be granted them." (*People v. Johnson* (1981) 120 Cal.App.3d 808, 815 (*Johnson*).) Work release

programs are not custodial and section 4019 is only concerned with conduct while a defendant is " 'in actual custody.' " (*People v. Wills* (1994) 22 Cal.App.4th 1810, 1812-1813 (*Wills*).)

The only indication as to why "jail staff" eliminated defendant's conduct credits was that defendant "failed his Work Release program." Defendant's arguments in favor of recovering only his good conduct time and not his labor conduct time, implies that defendant was assigned to a work release program and considers his failure to participate as a failure to do assigned labor necessary to earn labor conduct time. However, failure to participate in a work release program is not conduct attributable to the defendant being in custody. The remedy for such a failure is for the defendant to be brought back into custody to complete his sentence, and not forfeiture of section 4019 credits. (*Wills, supra*, 22 Cal.App.4th at p. 1813.)

There is no evidence that defendant misbehaved or refused to do work while in custody. Because "the record fails to show that defendant is not entitled [to conduct credits], he shall be granted them." (*Johnson*, *supra*, 120 Cal.App.3d at p. 815.)

The People contend the matter should be remanded because defendant did not request a hearing. However, the matter was contested during the sentencing hearing, and remand is not necessary. The People chose to "submit on the probation officer's report," and thus failed to introduce any evidence that defendant was not entitled to conduct credits. Defendant argued the issue before the trial court, including raising the percipient issue, that credits were not being withheld "because of problems [defendant]

created in the jail." Accordingly, the People failed to meet their burden, and the trial court erred in denying defendant his conduct credits.

Defendant served 256 actual days. Calculated by the "two-for-four" method, he should be awarded credit for 128 conduct days, for a total of 384 days. (See *People v. Browning* (1991) 233 Cal.App.3d 1410, 1413.)

III. COURT SECURITY FEE

Although not raised by the parties, we note that the trial court did not impose a $20 court security fee. Former section 1465.8, subdivision (a)(1), provided in relevant part that, "a fee of twenty dollars ($20) *shall* be imposed on every conviction for a criminal offense . . . ." (Italics added.)

This language is mandatory. "Section 1465.8's legislative history supports the conclusion the Legislature intended to impose the court security fee to *all* convictions after its operative date." (*People v. Alford* (2007) 42 Cal.4th 749, 754, italics added.) Where no fee is imposed at all the judgment should be modified on appeal to include the fee. (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1328.)

Thus, the judgment should be modified to include a $20 court security fee.

IV. DISPOSITION

The judgment is modified to include the imposition of a $20 court security fee pursuant to former section 1465.8, and include conduct credit of 128 days pursuant to section 4019. The superior court clerk is directed to amend the April 23, 2009, sentencing minute order to include the court security fee and conduct credits. The superior court clerk is also directed to amend the abstract of judgment to include the $20

court security fee in box 11, and include 128 days of section 4019 credits. The superior court clerk is then directed to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

KING
J.